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IN THE

Supreme Court of the United States

OCTOBER TERM 1939

No. 102

THE ATLANTIC REFINING COMPANY,
Petitioner,

vs.

JAMES B. BERRY SONS' COMPANY, INC.,
Respondent.

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT.

Respondent's brief misses the point of the petition and argues matters that are not in issue.

"At the threshold", it begins, "we would emphasize that the instant petition, filed May 25, 1940, seeks a review of exactly the same decision, or judgment, which this court refused to review when on January 2, 1940, it denied petitioner's first petition." Similarly, the main point of respondent's argument (pages 7-9) is that the instant petition seeks the same relief as the first petition.

Neither contention is accurate in fact or in substance.

Obviously the decision sought to be reviewed is not the same, for the instant petition seeks review of the order entered February 28, 1940 by the Circuit Court of Appeals (R. 660 s s s), whereas the first petition sought review of the judgment of that court entered September 27, 1939 (R. 660 1 1 1).

The relief sought is not the same, for the instant petition seeks the vacating of a judgment because it is void by reason of the extrinsic facts incident to its entry—the court consisting, on the date of entry, of but two judges whose individual opinions, contemporaneously filed, were exactly contradictory—whereas the first petition sought only the reversal of a judgment because of its inherent judicial errors.

There is no contention here concerning the merits. The contention here is that a void judgment can determine nothing and should be set aside. Respondent has overlooked or disregarded these fundamental differences which are controlling.

The distinction between judgments that are erroneous and judgments that are void is clearly established.[1] Relief from judgments that are erroneous is by review on the merits. Relief from judgments that are void is by order setting them aside without regard to the merits.[2]

Respondent's brief begs the issue raised by the instant petition,[3] and seeks to divert attention therefrom by reciting facts and presenting arguments relating solely to the merits.

RESPONDENT'S POINT I.

Asserting that the instant petition seeks the same relief as the previous petition which this Court denied, Respondent's first point is that "the instant petition is not timely filed" (page 7).

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[1] "The line which separates error in judgment from usurpation of power is very definite." *Vorhees* v. *Jackson*, 35 U. S. (10 Peters) 449, 474.

[2] *Moran* v. *Dillingham*, 174 U. S. 153, 158.

[3] It says (p. 13) that "we deem it unnecessary to discuss" the cases cited by Petitioners which establish the invalidity of the decree sought to be vacated and the effect thereof.

Both the premise and conclusion are faulty.

The premise is at fault, as we have pointed out, because the instant petition seeks the setting aside of the purported judgment of September 27, 1939, as a void judgment, whereas the previous petition sought review for correction of judicial error.

The purported judgment is void (1) because, in point of legal effect, Judge Dickinson did not participate in the decision on second rehearing below[4], and (2) because the joinder of a dissenting judge in authorizing the entry of an order cannot give legal effect to that order, where it is not, in fact, based upon the judgment of a majority of the court.[5] The purported judgment is thus void for prejudicial irregularity and lack of power,[6] and the court was without jurisdiction to render it.[7] In seeking to vacate that void judgment because the court below had no power to enter it, the petitioner is not seeking the same relief as was sought by the previous petition on the merits.

Nor is the denial of the previous petition any bar to the present proceeding. For it has been repeatedly held that an attempted review or even a complete review of a pur-

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[4] See Point I of our Petition, pages 9-11 thereof.

[5] See Point II of our Petition, pages 11-12.

[6] *Freeman, Judgments,* 5th Ed., §§217, 218.

[7] "There are in general three jurisdictional elements in every valid judgment, namely jurisdiction of the subject matter, jurisdiction of the person and *the power or authority to render the particular judgment.* For the absence of any one of these elements, when properly apparent, the judgment may be vacated *at any time,* whether before or after the term or the time limited by statute for motions on statutory grounds, either on motion or of its own volition without suggestion." *Freeman, Judgments,* 5th Ed., §226, pp. 44-5. (Italics ours.) See also *Wilson, Admr.* v. *Walker,* 109 U. S. 258, 265-267; *Windsor* v. *McVeigh,* 93 U. S. 274, 283.

ported judgment of a lower court does not limit or affect the right subsequently to have the judgment set aside as void for lack of jurisdiction or power of the court rendering it,[8] even though the judgment had been affirmed[9] and the facts, relied upon to show that it was void, had been in the record at the time of the appeal and the same relief could have been granted on that review.[10] A void judgment cannot be validated by consent, either actual or tacit,[11] nor even by affirmance on appeal.[12]

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[8] *Gouveia* v. *Nokamura*, 13 Hawaii 450, 452; *Scott* v. *Watkins*, 25 C. A. (Colo.) 340, 343; *Patterson* v. *Hochster*, 21 App. Div. (N. Y.) 432, 434.

[9] *Chambers* v. *Hodges*, 23 Texas 104.

[10] *Ensminger* v. *Powers*, 108 U. S. 292, 27 L. Ed. 732, 736.

[11] *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 18; *Frozen Egg Products* v. *U. S.*, 226 U. S. 172, 184; *Cutler* v. *Rae*, 48 U. S. 729, 731. As to acts beyond the power of the courts or after termination of a judge's term of office, see *Kurtz* v. *Cutler*, 178 Cal. 178, 181; *Freeman, Judgments*, 5th Ed. §354; 33 C. J. 963, §86. In *Chambers* v. *Hodges*, cited in footnote 9, the Appellate Court had previously affirmed the judgment below. Motion was subsequently made to set the judgment aside on the ground that the deciding judge was disqualified by interest (rather than by death, as in the case at bar). In ordering the judgment set aside, the court said at pages 112-113: "We conclude that the presiding judge being interested, was absolutely incapacitated to take cognizance of, or sit in the case. The consent of parties could not remove his incapacity, or restore his competency against the prohibition of the law; which was designed not merely for the protection of the party to the suit, but for the general interests of justice. And, consequently, the judgment rendered by him was a nullity, and left the case remaining undisposed of, as completely *as if the judge had not been present at the court.*" (Italics ours.)

[12] *Gille* v. *Emmons*, 58 Kan. 118; *Pioneer Co.* v. *Maddux*, 109 Cal. 633, 642; and *Freeman, Judgments*, 5th Ed., §322.

Hence, neither the filing of the previous petition nor the reference therein to Judge Dickinson's death constituted a waiver of, nor estoppel to deny, the invalidity of the September, 1939 judgment, nor was denial of that petition a bar to the instant proceeding to vacate that judgment as void.[13]

Respondent's conclusion that the petition to vacate was not timely filed is as faulty as its premise. For petitions to vacate void judgments are the appropriate remedy,[14] and are not limited as to time—mere lapse of time, unless amounting to laches, being immaterial.[15] No laches exist or are suggested in the case at bar.

Since it is clear that the relief here sought, *i. e.*, that a void judgment be vacated or set aside, is not the relief sought by the previous petition, *i. e.*, that an erroneous judgment be corrected, the comments on page 8 of respondent's brief are beside the point.

Specifically, this is not a case of a renewed and untimely application, but of a special proceeding to clear the record of a void order, a type of proceeding never barred by lapse of time alone.[16]

Again, the fact that certiorari on the merits was sought and denied has no bearing whatever on the power of the court below to enter the purported judgment, nor is it any bar to this proceeding to expunge that judgment.[17]

Nor is there any element of *res adjudicata* or of waiver. No question as to the merits is presented here. Nothing

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[13] *Atlantic Coast Line R.R. Co.* v. *Powe*, 283 U. S. 401, 403.

[14] *Wetmore* v. *Karrick*, 205 U. S. 141, 151.

[15] *Freeman, Judgments*, 5th Ed., §217; 34 C. J. 255, §486; *Ex parte Crenshaw*, 40 U. S. (15 Peters) 119; and see footnote 7 above.

[16] See footnote 15 above.

[17] See footnotes 8-13 above.

contained in or omitted from the previous petition could serve to validate the void judgment of the court below, which, lacking a majority, that court had no power or jurisdiction to enter.

And finally, as to the jurisdiction of this Court herein, respondent has failed to perceive that three of the cases cited in our petition (page 8), and to which respondent makes no reference, support the proposition that petition for certiorari is the proper procedure by which to bring to this Court application orf relief from a void decree; the other three, to which respondent refers, are cases in which this Court has exercised its jurisdiction to review the orders of lower courts which ruled upon applications for the vacating of decrees,—the situation of the case at bar.

For the reason that the relief here sought is distinct in fact and law from that sought by the previous petition, and goes to the power and jurisdiction of the court below to enter the September 1939 judgment, it is submitted that respondent's objection to the grant of the instant petition, stated in Point I of its brief, is unsound and should be overruled.

RESPONDENT'S POINT II.

Respondent's argument under this head is without merit for two reasons. First, it assumes and asserts, as matter of fact (pages 8 to 11), that the case was decided before Judge Dickinson's death. Second, it assumes, as matter of law, and without shadow of authority, that a decision unannounced until after a judge's death is as valid as if rendered during his life time.

Refuting the assertion of fact is the Memorandum entered by the court below (R. 660 m m) and quoted at pages 3-4 of respondent's brief, which states:

> "And afterwards, to wit, on the 27th day of September, 1939 * * * the Court, **now** being fully advised in the premises, renders the following decision." (Boldface ours.)

By its own record, the court thus places the rendering of its decision on September 27, 1939, and it speaks only as of that date. Judge Dickinson died on September 16, 1939.

But whether or not the judges had agreed among themselves before that date is of no legal consequence. For the cases are unanimous that so long as a decision lies in the breast of a judge and is not rendered or entered, it has no legal effect whatever.[18]

Respondent does not and cannot deny this established principle. The only case it cites (page 11) is one in which the judgment in question had been formally *entered* before the death of the judge (see *Insurance Co.* v. *Wilson,* 33 U. S. 291, top of pages 292 and 293). The judicial act of rendering and entering decision had thus been completed before the death of the judge. The signing of the judgment, after its entry, was but a ministerial duty "and not a judicial act". (Same case, at page 304.) Here, however, the judicial act remained undone at the time of Judge Dickinson's death. No associate or successor could subsequently perform that judicial act for him. No statement or footnote in Judge Biggs' opinion could give the legal effect of a duly rendered decision to what Judge Dickinson might have said in conference. The attempt to attribute to Judge Biggs' opinion the force of an opinion of two concurring judges was a prejudicial irregularity and a usurpation of power. His opinion was his own and nothing more. There were not three judges of the court but only two on the date when the judicial act was performed. And lacking the required majority of the court on that date the purported majority opinion and judgment were in law utterly void.

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[18] See page 10 of brief in support of the instant petition.

RESPONDENT'S POINT III.

In support of this point respondent relies upon *dicta* in two cases which are not in fact authority for respondent's proposition. In *Hook* v. *Mercantile Trust Co.*, 95 Fed. 41, the point actually decided is that an order granting rehearing has the effect of keeping the cause pending in the appellate court, so that a motion to dismiss for lack of "summons and severance" subsequently filed is not defective on the ground of being filed too late. The court held that such a motion "is jurisdictional * * * and may be raised at any time before final disposition of the appeal". Hence the matter italicized in respondent's brief was unnecessary to the decision.

In the other case cited by respondent (page 12), *United States* v. *Bentley & Sons Co.*, 293 Fed. 229 (D. C., S. D. Ohio), the only question under consideration in the portion of the opinion referred to was whether a prior decision of another court was entitled to a controlling status where rehearing had been granted and the judgment subsequently affirmed on rehearing.

Neither of these cases involved decision of the point here in issue.

Respondent does not discuss nor attempt to distinguish the decision in *Florida Motor Lines* v. *Hill*, 106 Fla. 33, 143 So. 261, cited on page 13 of our petition. That case is on all fours with the case at bar both with respect to the rules of court relating to rehearings and to the particular terms of the order granting the rehearing.

As to the rules, the court there said:

> "Petitions for rehearing are under our rules filed and considered as ex parte matters.
>
> "The granting of such petitions when they are favorably acted upon, is likewise ex parte."
>
> * * * * *

"And, unless expressly so ordered by the Appellate Court, the mere granting of an ex parte application for a rehearing should not be considered nor construed as working a complete vacation, annulment, and setting aside of the previous judgment of the Appellate Court, as to which the rehearing is granted, but more properly should be considered as a mere arresting or suspending of such previous Appellate judgment pending the rehearing and reconsideration of the case on the rehearing awarded.

"This rule necessarily applies to all cases where the court grants a rehearing on ex parte application of one of the parties asking reconsideration of the case for some alleged oversight or error in the court's initial opinion or judgment in the case."

As to the orders, the Florida court said:

"In this case the order entered by us on the petition for rehearing is: 'A petition for rehearing having been filed in this cause and same having been duly considered, it is ordered by the Court that the said petition be and the same is hereby granted.' No order affirmatively vacating or setting aside our former judgment of reversal was entered. The only order appearing in our minutes is that the petition for rehearing 'be and the same is hereby granted.' "

The order of April 20, 1939 (R. 660 m m m), referred to at page 12 of respondent's brief, is a substantial counterpart of that quoted in the Florida case. The order does not purport to vacate the judgment of December 21, 1938 (R. 660 d d) nor has it any such effect.

The Florida court said of its corresponding order:

"This order under our rules had the effect of arresting the issuance of the mandate until further order of the Court. It also reinstated the case upon our docket for reconsideration upon the rehearing ordered. Thus the original judgment of this Court that the judgment of the Circuit Court be reversed was merely suspended, and not annulled, vacated or set aside, as might have been done by a special and affirmative order to that effect entered at the term during which rehearing was granted."

The Florida case is, we submit, indistinguishable on its facts from the case at bar. Additional citation of authority to the same effect will be found on page 13 of our brief in support of petition.

On principle, as well as authority, we submit that where an Appellate Court has twice unanimously given judgment for plaintiff, it is contrary to equity and justice that the plaintiff should be defeated when on second rehearing the court finds itself equally divided.

CONCLUSION.

In view of this injustice and of the fact that respondent has by its failure to discuss the authorities cited in our petition substantially admitted that the September, 1939 judgment is void for lack of power in the court to enter it, and because respondent's objections to the petition are technical and unsound, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully,

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EDGAR F. BAUMGARTNER,
Counsel for Petitioner.

Dated, New York, N. Y.,
August 16, 1940.